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IN THE

Supreme Court of the United States

October Term, 1963

No. 346

CARLIE Di PIETRO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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The petitioner respectfully invites the Court's attention to the following:

1. The Government brief erroneously asserts that "All petitioners *except Di Pietro* (No. 346) and Galante (No. 468) state that they adopt, insofar as applicable, the questions presented in companion petitions for certiorari" (p. 3). (Italics supplied) On page 30 of Di Pietro's petition there appears the following statement:

> "The petitioner Di Pietro respectfully adopts each and every ground for granting certiorari submitted by his co-defendants, insofar as they may be applicable to his case."

2. The Government's brief also erroneously states that the petitioner Di Pietro "was found guilty of contemptuous conduct during the course of the [first] trial," and cites *United States* v. *Galante*, 298 F. 2d 72, cert. den. *sub nom.*

Mirra v. *United States*, 371 U.S. 927, in support of this assertion. In point of fact, Di Pietro was *not* held for contempt during or after the first trial; he never so much as opened his mouth during the entire course of that abortive proceeding. Furthermore, the Government's citation of purportedly supporting authority for its erroneous statement is oddly distorted. The case cited, at 298 F. 2d 72, involved the contempt of Galante and Mirra at the first trial, *not* of Di Pietro. The denial of certiorari cited (371 U.S. 927) does indeed involve a contempt citation against Di Pietro, but it relates to the *second* trial, the one as to which review is here sought.

3. The Government's brief is also unfair and misleading in that it describes Di Pietro's denunciation of Panico in a context of acts of other defendants which were not, like Di Pietro's, provoked by Panico's improper behavior (p. 26). The Government seeks to make Di Pietro's act seem highly improper and contemptuous. In point of fact, the petitioner verbally assailed Panico only after Panico had described him, in the jury's hearing, as a "dope pusher" (Tr. 5,889). Most significantly, the trial judge himself acknowledged that this incident had been the product of "extreme provocation" against Di Pietro (Tr. 9,060).

4. The Government's assertion that the trial judge did not abuse his discretion in failing to sever the trial of Panico (pp. 27-28) is also clearly erroneous. It is expressly founded on the premise that the "trial judge reasonably concluded Panico's behavior was not the uncontrollable product of mental illness" (p. 28), which flies squarely in the face of this Court's recent holding to the contrary in *United States* v. *Panico*, No. 45, in the October Term, 1963.

If Panico's trial should have been severed—as seems demonstrably clear from this Court's ruling on Panico's petition for certiorari—then it follows that Di Pietro's motion for a mistrial, founded on the failure to sever Panico's trial should have been granted, and the failure to accord that relief constituted reversible error. (See Di Pietro's Petition For a Writ of Certiorari, pp. 24-26.)

5. The Government's own brief underscores the injustice of the rule of *United States v. Aviles*, 274 F. 2d 179, cert. den., 362 U. S. 974, by admitting that three of the defendants—including Di Pietro*—were not shown to have been responsible for the trial disorder, but nevertheless maintaining that even these defendants should not have been granted a mistrial. As petitioner has already argued at length, this conclusion "violates the right of **each** of the defendants in a conspiracy trial to have his guilt determined individually. (See *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 773-776)." (See Petition, pp. 14-21).

Respectfully submitted,

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October 28, 1963.

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* At page 27 of its brief, the Government admits that "Mancino, Fernandez and **concejvably Di Pietro**" were not parties to the trial disorder. The slight reservation in regard to Di Pietro was probably based on the Government's erroneous belief that Di Pietro had been convicted of contempt as a result of his behavior at the first trial (see, *supra*, subd. 2).